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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536



File: WAC 01 278 50938

Office: CALIFORNIA SERVICE CENTER

Date:

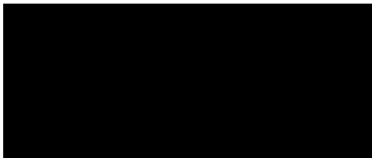
IN RE: Petitioner:
Beneficiary:



MAY 07 2003

Petition: Immigrant Petition for Alien Worker as an Outstanding Professor or Researcher pursuant to Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

ON BEHALF OF PETITIONER:



**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained and the petition will be approved.

The petitioner seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B), as an outstanding researcher. The director determined that the beneficiary works as an engineer rather than a researcher, and therefore does not qualify for the classification sought.

Section 203(b)(1)(B)(iii)(III) of the Act provides that visas shall be made available to qualified immigrants with international recognition and three years of experience “to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.”

The petitioner researches and designs optical components, modules and subsystems for optical networking. The petitioner seeks to employ the beneficiary as its vice president of engineering.

The director’s sole stated ground for denying the petition was the finding that the beneficiary engages in engineering and management, rather than in research. Because the nature of the beneficiary’s duties is central to the denial of the petition, we examine here the description of these duties. In a letter submitted with the initial petition, James Eu, the petitioner’s CEO and chairman of the board of directors, states:

The Engineering Division is responsible for all activities relating to the company’s research, development, and testing of optoelectronic devices and subsystems for integration with equipment from optical network system manufacturers, including planar lightwave circuit devices, integrated optical devices and active optoelectronic components, as well as for the patented and proprietary processes that make their manufacture and function possible.

As VP of Engineering, the beneficiary oversees a team of over 20 engineers and technicians . . . who report to, and take direction from, her for applicable R&D activities, from MOCVD fabrication, to chip processing, to final packaging, and testing.

The director wrote to the petitioner, stating “[i]t appears that the beneficiary will be functioning as a manager rather than as a researcher. Provide a detailed explanation of the beneficiary’s job duties. If any other individuals will be involved in the supervision of the 20 engineers provide a description of their job duties as well.” In response, the petitioner has submitted a letter from Judy Sable, the petitioner’s human resources manager, who states:

[The beneficiary] directly supervises only six engineers (Director/Chief/Senior), including five engineers who each lead Research and Development groups and one engineer who is a high level individual researcher. . . .

Each [of the five group leaders] directly supervises the engineers working within their groups. . . .

[The beneficiary's] critical research and development contributions are in two major areas: (1.) wafer structure design and metal organic chemical vapor deposition (MOCVD) growth and (2.) very high anti-reflective coating. [The beneficiary] has two patent applications pending and is in the process of submitting additional patents as the result of her current R&D activities.

[The beneficiary] provides key contributions in the research and development of semiconductor optical amplifiers (SOAs). . . . In particular, [the beneficiary] has personally developed critical technical breakthroughs. . . .

Within the [redacted] [the beneficiary] researches the structure design and review of growth parameters such as temperature, pressure, flow rate, and doping level for grow[ing] $\text{In}_{1-x}\text{Ga}_x\text{As}_y\text{In}_{1-y}/\text{InP}$ material. In the [redacted] [the beneficiary] researches the design of film coatings for different structures to reach very high anti-reflective coating specifications.

The director denied the petition, stating that the petitioner's work appears to conform more closely to the definition of engineering than that of research. The director asserted "the Service is not convinced that the work in which the beneficiary will be engaged in [sic] is indicative of a research position which is comparable to research positions in universities or institutions of higher learning." The director also stated "the position is such that the beneficiary would need to be involved in management duties. It would not be sound business practice to monitor the performance of the directors and senior engineers" who are listed as the beneficiary's subordinates.

On appeal, counsel asserts that the director misinterpreted the statute and regulations: "There is no restriction under Section 203(b)(1)(B) of the Act and 8 C.F.R. § 204.5(i) that a researcher with a private employer must be engaged in a particular type of scholarly or advanced theoretical research or only research that is similar to what is conducted within an institution of higher learning." The term "comparable position" in the statute and the regulations appears to mean a permanent position, "comparable" to a tenured or tenure-track position, rather than involving specific duties "comparable" to those of a university researcher.

The petitioner submits new letters from various individuals within and outside of the petitioning company, emphasizing the beneficiary's work as a researcher. Several of these witnesses indicate that they have actively collaborated with the beneficiary while the beneficiary has worked for the petitioner. Substantiating these assertions are copies of published articles, showing the beneficiary as a credited

co-author, published during the beneficiary's time with the petitioning company. These articles show that the beneficiary has, since joining the petitioning company, continued to produce and publish research findings. The articles, therefore, are strong corroboration for the assertion that the petitioner is conducting research rather than simply supervising workers and conducting engineering tasks.

An individual whose duties consist entirely of product design through configuration of existing technology, or preparation of specialized software using widely available software packages, is not engaging in research. In this instance, however, the latest submission of materials demonstrates that the beneficiary has engaged, and continues to engage, in research for the petitioner. The beneficiary's work involves innovation and invention and transcends product design and software adaptation. The petitioner has maintained that the beneficiary's managerial and supervisory duties occupy only a small fraction of the beneficiary's time, and that assertion appears to be credible based on the available documentation. The petitioner has thus overcome the only stated ground for the denial of the petition.

Review of the record does not readily yield other grounds for denial. Based on the evidence submitted, we conclude that the petitioner has established that the beneficiary qualifies under section 203(b)(1)(B) of the Act as an outstanding researcher.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.